

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 60

Docket No. DC-1221-10-0164-B-2

Ronald J. Herman,

Appellant,

v.

Department of Justice,

Agency.

August 12, 2013

Dennis L. Friedman, Esquire, Philadelphia, Pennsylvania, for the appellant.

Gail Elkins, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision denying his request for corrective action under the Whistleblower Protection Act.¹ For the

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. We therefore find good cause to waive the newly-implemented petition for review length limitations of [5 C.F.R. § 1201.114\(h\)](#). See [5 C.F.R. § 1201.12](#). Otherwise, even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

reasons discussed below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The appellant is a GS-13 Human Resource Management Examiner with the Bureau of Prisons (BOP). In that position, he reviews and evaluates programs with each of BOP's 116 correctional facilities and its central Human Resources Department in Grand Prairie, Texas. Initial Appeal File (IAF), Tab 5 at 19.

¶3 The appellant filed an individual right of action (IRA) appeal alleging that the agency retaliated against him for protected whistleblowing by taking the following personnel actions against him: issuing him two letters of counseling; giving him an unfavorable mid-year performance review; and reassigning him to a different position. IAF, Tab 1 at 9; Remand Appeal File (RAF), Tabs 2, 17.²

¶4 The appellant alleged that he made the following disclosures protected under the Whistleblower Protection Act: a manager violated the Privacy Act by telling the appellant's second level supervisor, Rachel Stock, that the appellant's review of the Bureau of Prisons Consolidated Employee Services Center in Grand Prairie may have been unduly harsh because his daughter who had worked there had been disciplined; his first level supervisor, Ronda Eddy, abused her authority by issuing two letters of counseling, issuing a critical mid-year performance review, and threatening to detail him to another position while indicating that if the appellant applied for another position she would make that all go away; and

² The appellant listed a number of other alleged retaliatory personnel actions in his Office of Special Counsel complaint and his initial appeal to the Board. IAF, Tab 1 at 9, Tab 5 at 21-22. During the course of the proceedings, the administrative judge narrowed the personnel actions to those listed above. RAF, Tabs 2, 17, 34, Initial Decision. The appellant has not challenged the administrative judge's narrowing of these issues. In any event, it appears that the additional personnel actions are attendant to those listed above.

Ms. Eddy and Ms. Stock abused their authority during a number of facility reviews by arriving late, not interacting with the review team, making sarcastic and inappropriate comments in front of the team, and delegating to an inmate the handling of sensitive documents. IAF, Tab 5 at 19-21.

¶5 The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation that he had made a protected disclosure. IAF, Tab 14. The Board reversed the initial decision, found that the appellant had made a nonfrivolous allegation that he made protected disclosures, and remanded the appeal for a hearing. *Herman v. Department of Justice*, [115 M.S.P.R. 386](#) (2011). On remand, the administrative judge exercised his discretion to take evidence on the merits issues in the order he deemed most efficient. He bifurcated the hearing and allowed testimony only on the issue of whether the agency established by clear and convincing evidence that it would have taken the actions against the appellant in the absence of his whistleblowing. RAF, Tabs 2, 17.

¶6 Based on the record developed by the parties on remand, including the testimony at the hearing, the administrative judge denied the appellant's request for corrective action. RAF, Tab 34, Initial Decision (ID). He addressed the four personnel actions listed above and found that the agency proved by clear and convincing evidence that it would have taken them notwithstanding the appellant's disclosures. ID at 6-13. Specifically, the administrative judge found that Ms. Eddy credibly testified that she issued the first letter of counseling in March 2008, because the appellant had problems interacting with Ms. Stock. ID at 8-9. He found that Ms. Eddy credibly testified that she issued the second letter of counseling in April 2008, because she believed that the appellant was not being prudent in his travel plans. *Id.* He also found that Ms. Eddy's credible and uncontradicted testimony established that she was confident that the unfavorable comments on the appellant's mid-year progress review accurately described the appellant's performance deficiencies. ID at 10-11. Finally, the administrative

judge found that neither Ms. Eddy nor Ms. Stock was involved in the appellant's reassignment, and that the credible uncontradicted testimony of appellant's fourth level supervisor, VaNessa Adams, established that she first detailed and subsequently reassigned the appellant because of the Office of Internal Affairs' (OIA) investigation into whether the appellant falsified his program review of the agency's Big Sandy facility. ID at 11-12. He found that the agency established that reassignment is a normal procedure during such an investigation. *Id.* Based on these findings, the administrative judge concluded that the agency met its burden to show by clear and convincing evidence that it would have taken the actions against the appellant in the absence of his disclosures. ID at 12-13.

¶7 The appellant has filed a petition for review, arguing that the administrative judge erred in his fact findings and credibility determinations and prevented him from fully developing his case. Petition for Review (PFR) File, Tab 5 at 10-43. The appellant also argues that the administrative judge abused his discretion in denying his request for spoliation sanctions, *id.* at 44-48, and that the administrative judge was biased and therefore abused his discretion in denying his motion for recusal and declining to certify the issue for interlocutory appeal, *id.* at 40-41. The agency has filed a response, arguing that the initial decision was correct and that the petition should be denied for failure to meet the Board's review criteria. PFR File, Tab 14.

ANALYSIS

The administrative judge did not abuse his discretion in denying the appellant's motion for spoliation sanctions.

¶8 Shortly before midnight on August 15, 2011—the day before the scheduled hearing—the appellant filed a motion for spoliation sanctions. RAF, Tab 32. The appellant sought several adverse inferences against the agency due to the agency's alleged destruction of emails to and from Ms. Stock, which he claimed would have shown that Ms. Stock influenced the personnel actions at issue. *Id.*

At the hearing, the administrative judge advised the appellant that he had read the motion. He commented on the timing of the motion and noted that the agency had not had the chance to provide a meaningful response. Hearing Compact Disc (HCD). The administrative judge denied the motion without further discussion. *Id.* On review, the appellant reiterates his arguments in favor of spoliation sanctions and argues that the administrative judge abused his discretion by denying the motion “without explanation or justification.” PFR File, Tab 5 at 44-48.

¶9 We find that the administrative judge’s ruling did not constitute an abuse of discretion. The deadline for completing discovery was August 1, 2011. RAF, Tab 1 at 3. The appellant should have known on or before that date whether he had a basis for seeking sanctions for spoliation. Indeed, it appears that the appellant was aware at least by July 26, 2011, that the agency was claiming that the documents he sought were unavailable. PFR File, Tab 5 at 45. The appellant has not explained why he waited until 11:30 p.m. the day before the hearing to file his motion for sanctions. Although the administrative judge does not appear to have explicitly set a deadline for filing such a motion, he would likely have had to delay the hearing if he had granted it to the extent that the adverse inferences would have affected the agency’s litigation strategy. In this regard, we note that the administrative judge’s ruling was not “without explanation or justification.” Rather, he clearly indicated that he was disinclined to grant a motion for spoliation sanctions filed at literally the eleventh hour. HCD. Given the administrative judge’s primary responsibility for ruling on motions and ensuring expedient adjudication of appeals, along with the deferential standard under which the Board reviews such rulings, we find no abuse of discretion under the circumstances. *See Hoback v. Department of the Treasury*, [86 M.S.P.R. 425](#), ¶ 6 (2000); [5 C.F.R. § 1201.41](#)(b).

The appellant has not established that the administrative judge abused his discretion in denying the motion for recusal and in not certifying the issue for interlocutory appeal.

¶10 The appellant argues that the administrative judge demonstrated bias against him during the course of settlement discussions. PFR File, Tab 5 at 40-41. Specifically, the appellant argues that the administrative judge called his representative's refusal to provide attorney fee and leave documentation prior to a written settlement offer "unreasonable," and that the administrative judge was "spiteful" and falsely told the agency's representative that the appellant was not interested in settling. *Id.* The appellant argues that this is concrete evidence of bias that provides a sound basis for recusal or alternatively certification for interlocutory appeal. *Id.*

¶11 We disagree. Taking as true the statements that the appellant attributes to the administrative judge, we find nothing improper, much less evidence of "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Smets v. Department of the Navy*, [117 M.S.P.R. 164](#), ¶ 15 (2011). Administrative judges are permitted to engage in frank settlement discussions with the parties. *See Chakravorty v. Department of the Air Force*, [90 M.S.P.R. 304](#), ¶ 8 (2001). Although the appellant might not have liked the administrative judge's assessment of his settlement position, the administrative judge did not exhibit bias by advising the appellant's representative that he was being unreasonable. *See id.* We acknowledge that we are unable to assess the administrative judge's tone with the appellant's representative. However, even assuming that he spoke in what might be called a "spiteful" manner, this would appear to be nothing more than a manifestation of his frustration with the breakdown of the settlement process, which the administrative judge attributed to the appellant's unreasonableness. Considering the totality of the circumstances, we find insufficient evidence to overcome the presumption of honesty and integrity that the administrative judge enjoys. *See Oliver v. Department of*

Transportation, [1 M.S.P.R. 382](#), 386 (1980). We therefore also find that the administrative judge did not abuse his discretion in denying the appellant's motions for recusal and certification for interlocutory appeal.³ See [5 C.F.R. §§ 1201.42](#) (procedures for disqualifying a judge), 1201.92 (criteria for certifying an interlocutory appeal).

The record is not sufficiently developed for the Board to determine whether the agency carried its burden by clear and convincing evidence.

¶12 The appellant argues that the administrative judge erred in excluding testimony regarding Ms. Stock's involvement in the allegedly retaliatory personnel actions taken by Ms. Eddy and Ms. Adams. PFR File, Tab 5 at 41-43. He asserts that the administrative judge erred in limiting Ms. Eddy's testimony regarding a meeting that she had with the appellant in which she allegedly mentioned that Ms. Stock was out to destroy the appellant. Ms. Eddy testified that, while she was going through the checkout process on the date of her retirement in 2008, she spoke with the appellant. PFR File, Tab 5 at 42. She testified that she apologized to the appellant "for the circumstances that had, that he went through." *Id.* In response to the appellant's counsel's question "Did you mention to him something to the effect that [Ms. Stock] was out to destroy [the appellant]," she replied "No." *Id.* At that point, agency counsel objected and the administrative judge sustained the objection on the basis of relevance. PFR File, Tab 5 at 42. The appellant, however, argues that if the questioning of Ms. Eddy had continued, she would have testified that Ms. Stock pressured her to issue the letters of counseling and issue an unfavorable mid-year performance review. *Id.* at 43.

³ In any event, at this point, the question of whether the administrative judge should have certified the recusal issue for interlocutory review is moot.

¶13 The appellant also contends that Ms. Stock caused the OIA investigation and the resulting reassignment by Ms. Adams. PFR File, Tab 5 at 38. He alleges that Ms. Stock requested review of the appellant's Big Sandy work product and emailed Ms. Adams and Delores Stephens, the appellant's third line supervisor, stating that the appellant "intentionally failed to review appropriate documentation and record accurate information to adequately assess the Employee Services operation at Big Sandy." *Id.* at 24-25, 29 n.13. The appellant further alleges that Ms. Stock forwarded that email to OIA and that, based on the information that Ms. Stock provided to OIA, it initiated a criminal investigation of the appellant. *Id.* at 25. The appellant also alleges that Ms. Stock influenced the investigation during her five meetings with OIA to discuss the investigation. *Id.*

¶14 The appellant attempted to submit documentary and testimonial evidence in support of his allegation regarding Ms. Stock's involvement in the OIA investigation. After the administrative judge's Summary of Telephonic Prehearing Conference, RAF, Tab 17, the appellant filed a Motion to Include Additional Witnesses and Additional Hearing Exhibits, RAF, Tab 21. In his Motion, the appellant stated that, after the prehearing conference, the agency provided him with supplementary discovery responses, including the OIA investigative report and some of the documentation relied on by the OIA investigator. RAF, Tab 21. The appellant asked the administrative judge to accept into the record copies of documents that the appellant supplied to the OIA investigator that were not included in the OIA investigative report. *Id.* The appellant also requested two OIA personnel involved in his case as witnesses. *Id.* The appellant argues that the testimony of these witnesses would have been probative of whether the criminal investigation was caused by Ms. Stock and was based on her retaliatory and baseless allegation that the appellant falsified documents when the investigation revealed only mistakes that should have been dealt with by supervisory inquiry, not an OIA criminal investigation. *Id.* The

appellant argues that the motion was based on responses to discovery requests made prior to the prehearing conference; however, the administrative judge denied the appellant's motion stating that all discovery ended as of the time of the telephonic prehearing conference. RAF, Tab 29.

¶15 In *Whitmore v. Department of Labor*, [680 F.3d 1353](#) (Fed. Cir. 2012), which was decided after the administrative judge issued his initial decision, the court addressed the clear and convincing standard. It found that the Board may not exclude or ignore evidence necessary to adjudicate the whistleblower retaliation claim, but rather must consider all of the relevant evidence. The court found that the Board cannot decide whether the agency has carried its burden by “clear and convincing evidence” by looking only at the evidence that supports the conclusion reached. *Id.* at 1367-68. It explained that “[e]vidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion.” *Id.* at 1368. The court noted that “[i]t is error for the MSPB to not evaluate all the pertinent evidence in determining whether an element of a claim or defense has been proven adequately.” *Id.* In considering the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision, the Board must consider evidence of other officials not directly involved but who may have influenced the decision by a retaliatory motive. *Id.* at 1370.

¶16 Direct evidence of an agency official's retaliatory motive is typically unavailable because such motive is almost always denied. Therefore, federal employees are entitled to rely on circumstantial evidence to prove a motive to retaliate. *McCarthy v. International Boundary & Water Commission*, [116 M.S.P.R. 594](#), ¶ 31 (2011). Thus, in determining whether an agency has proven by clear and convincing evidence that it would have taken an alleged retaliatory action absent an appellant's whistleblowing, the administrative judge “will consider any motive to retaliate on the part of the agency official who

ordered the action, as well as any motive to retaliate on the part of other agency officials who influenced the decision.” *Id.*, ¶ 62. For example, the Board has found that a proposing official’s strong motive to retaliate may be imputed to a deciding official in some circumstances. *See Miller v. Department of Veterans Affairs*, [92 M.S.P.R. 610](#), ¶¶ 19-20 (2002).

¶17 In this case, the administrative judge disallowed testimony that might have suggested that Ms. Stock had a retaliatory motive and that she influenced Ms. Eddy’s and Ms. Adams’s personnel actions, either directly or indirectly. As noted above, the record shows a pattern of the appellant’s alleged protected disclosures, each involving Ms. Stock, being followed by adverse personnel actions taken by Ms. Eddy and Ms. Adams. The appellant attempted to elicit testimony from Ms. Eddy to show that Ms. Stock influenced her to issue the letters of counseling and the unfavorable mid-year performance review. The appellant also attempted, by examining one OIA witness and trying to call two others, to introduce evidence showing that Ms. Stock manipulated the Big Sandy review so as to cause Ms. Adams’s reassignment decision.

¶18 Under the administrative judge’s reasoning in the initial decision, however, allegations of retaliatory motive by Ms. Stock can be dispelled if the agency officials taking the alleged retaliatory actions credibly deny having a retaliatory motive. As the court stated in *Whitmore*, “[t]his reasoning flies in the face of congressional intent, and is a perfect example of why the agency is expected to carry a ‘high burden’ to prove that [a whistleblower] would have [suffered an adverse personnel action] regardless of his whistleblowing.” 680 F.3d at 1372. An appellant in an IRA appeal is at an evidentiary disadvantage when it comes to proving the retaliatory motive of an official who did not take the actions if a mere denial by the officials who took the actions is sufficient to remove the possibility of retaliatory motive. *See id.* In this manner, the agency can “build” a more defensible case, as the appellant alleges was done by having Ms. Eddy and Ms. Adams testify to the exclusion of evidence regarding Ms. Stock’s influence

over the alleged retaliatory actions. Under these circumstances, the administrative judge should not have excluded evidence that might have revealed Ms. Stock's influence over the circumstances that led Ms. Eddy and Ms. Adams to take actions against the appellant.

¶19 It appears that the administrative judge's evidentiary rulings were occasioned, at least in part, by his decision to bifurcate the hearing and proceed directly to the clear and convincing evidence issue without deciding whether the appellant made a protected disclosure that was a contributing factor to a personnel action. RAF, Tabs 2, 17. The Board and its administrative judges have historically sought judicial economy through this procedural option, especially in the context of IRA appeals, which can be very factually intensive. *See Dick v. Department of Veterans Affairs*, [290 F.3d 1356](#), 1363 (Fed. Cir. 2002); *Sutton v. Department of Justice*, [94 M.S.P.R. 4](#), ¶ 17 (2003), *aff'd*, 97 F. App'x 322 (Fed. Cir. 2004). However, after the administrative judge issued his initial decision, the Federal Circuit issued *Whitmore*, [680 F.3d 1353](#), in which the court cautioned the Board against unduly restricting evidence in whistleblower claims. We do not think that *Whitmore* or *Kahn v. Department of Justice*, [618 F.3d 1306](#), 1316 (Fed. Cir. 2010), in which the court stated its preference that the Board resolve all issues in an IRA appeal, necessarily foreclose bifurcated hearings or proceeding directly to the agency's rebuttal case under appropriate circumstances. However, we do think that they require the Board to use care in doing so and to reserve bifurcation for unusual cases. Above all, administrative judges should bear in mind that some matters pertinent to the appellant's prima facie case may also be relevant to the agency's rebuttal case. *Compare Jenkins v. Environmental Protection Agency*, [118 M.S.P.R. 161](#), ¶ 16 (2012) (the appellant bears the burden of showing a nexus between the disclosure and the personnel action) with *Carr v. Social Security Administration*, [185 F.3d 1318](#), 1323 (Fed. Cir. 1999) (with respect to the agency's rebuttal case, the Board will consider the existence and strength of any motive to retaliate on the part of the agency officials involved).

In other words, full and fair consideration of the appellant's claims may require adjudication of both the merits of his showing of a contributing factor as well as the agency's affirmative defense. *See, e.g., McCarthy*, [116 M.S.P.R. 594](#), ¶¶ 31-32.

¶20 In the instant appeal, the circumstantial evidence bearing on retaliatory motive includes the substance of the appellant's allegedly protected activity as well as the extent to which Ms. Stock was aware of it. Ms. Stock was an agency official involved in each of the appellant's disclosures. She was the official who was told that the appellant's review of the Bureau of Prisons Consolidated Employee Services Center in Grand Prairie may have been unduly harsh because his daughter who had worked there was disciplined. She also was Ms. Eddy's supervisor, and the appellant's treatment of Ms. Stock was addressed in the March letter of counseling issued by Ms. Eddy. Additionally, Ms. Stock was an official whom the appellant alleged abused her authority during a number of facility reviews by arriving late, not interacting with the review team, making sarcastic and inappropriate comments in front of the team, and delegating to an inmate the handling of sensitive documents. Here, Ms. Stock's motive to retaliate is relevant to both the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision, *see Carr*, 185 F.3d at 1323, and to the appellant's prima facie case, *McCarthy*, [116 M.S.P.R. 594](#), ¶ 31. Thus, resolution of both the merits of the appellant's showing of a contributing factor and the agency's affirmative defense is required. We cannot properly assess the existence and extent of any retaliatory motive in this appeal without considering the nature of the appellant's disclosures and the extent to which Ms. Stock was aware of them and may have influenced Ms. Eddy and Ms. Adams to take actions against the appellant. We therefore must remand the appeal for further adjudication.

ORDER

¶21 We REMAND this appeal for further adjudication of the appellant's prima facie case of whistleblower reprisal and, if necessary, a new analysis of whether the agency established by clear and convincing evidence that it would have taken the personnel actions at issue in the absence of the appellant's disclosures, in accordance with the guidance set forth in *Whitmore*. On remand, the administrative judge shall afford the parties the opportunity to conduct discovery and submit evidence on the issues identified in this Opinion and Order that were not fully adjudicated during the initial proceedings.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.